IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

- against -

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York, and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Fermina Montez, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in

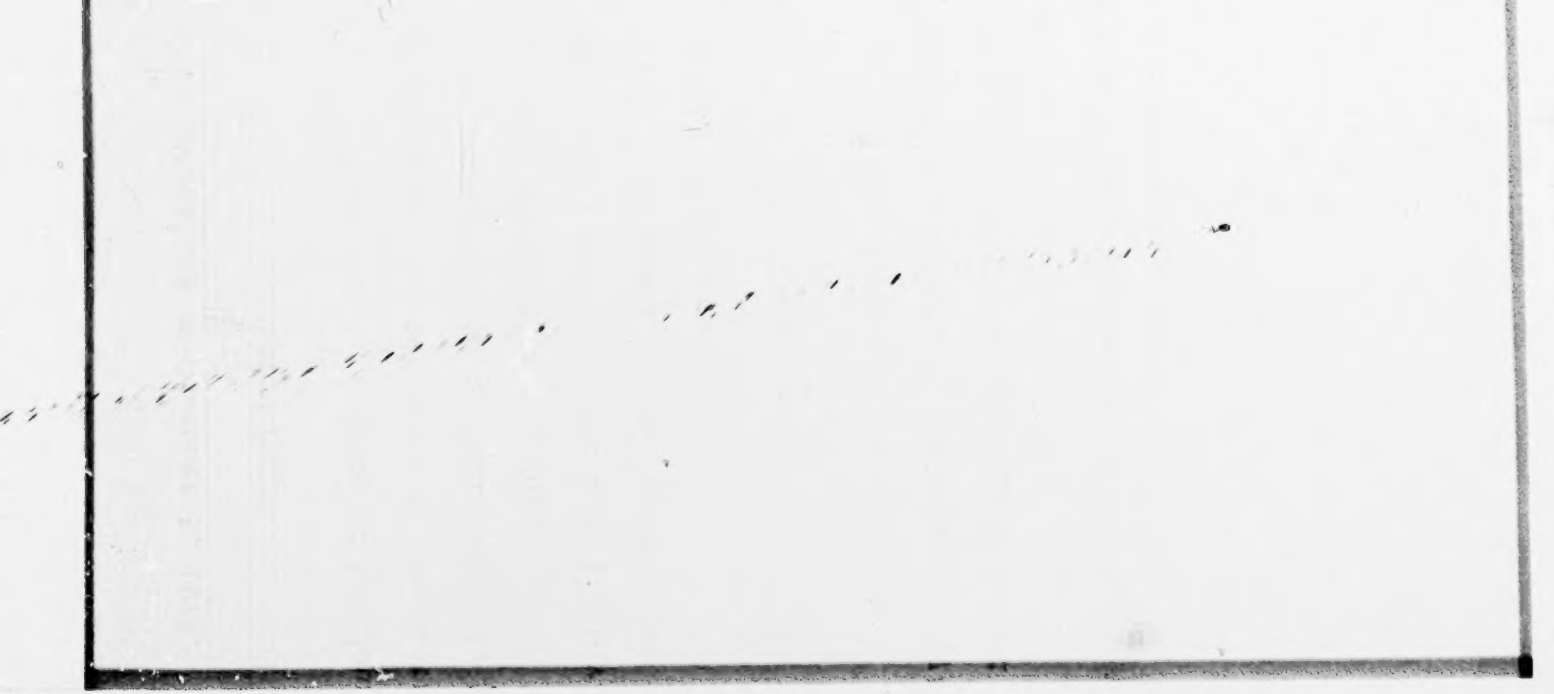
this proceeding on December 5, 1974.

OPINION BELOW

There was no opinion of the Court of Appeals. The decisions of the District Court were rendered by Dudley Bonsal, D.J., Southern District of New York, on May 7, 1973 and March 25, 1974 (69 Civ. 4773). The decisions and opinion are annexed in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1974. This petition for certiorari is issued within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).



QUESTIONS PRESENTED

Where a welfare recipient was denied money under statutory provisions (step-father rule) declared unconstitutional by this Court and sought only that sum of money denied after the welfare department corrected its computation to pay the full amount:

1. Does the District Court have power to award the denied benefits?

2. Does the immunity afforded to states by the Eleventh Amendment extend to municipalities and municipal officials in a suit for specific money damages?

STATUTES INVOLVED ARE:

28 U.S.C. §1254(i)

42 U.S.C. §601ff

42 U.S.C. §602(a), (b)

New York Const. Art. IX, §9(1)(c)
§9(a)(c)(1)
§9(a)(c)(5)

New York Municipal Home Rule Law, §10

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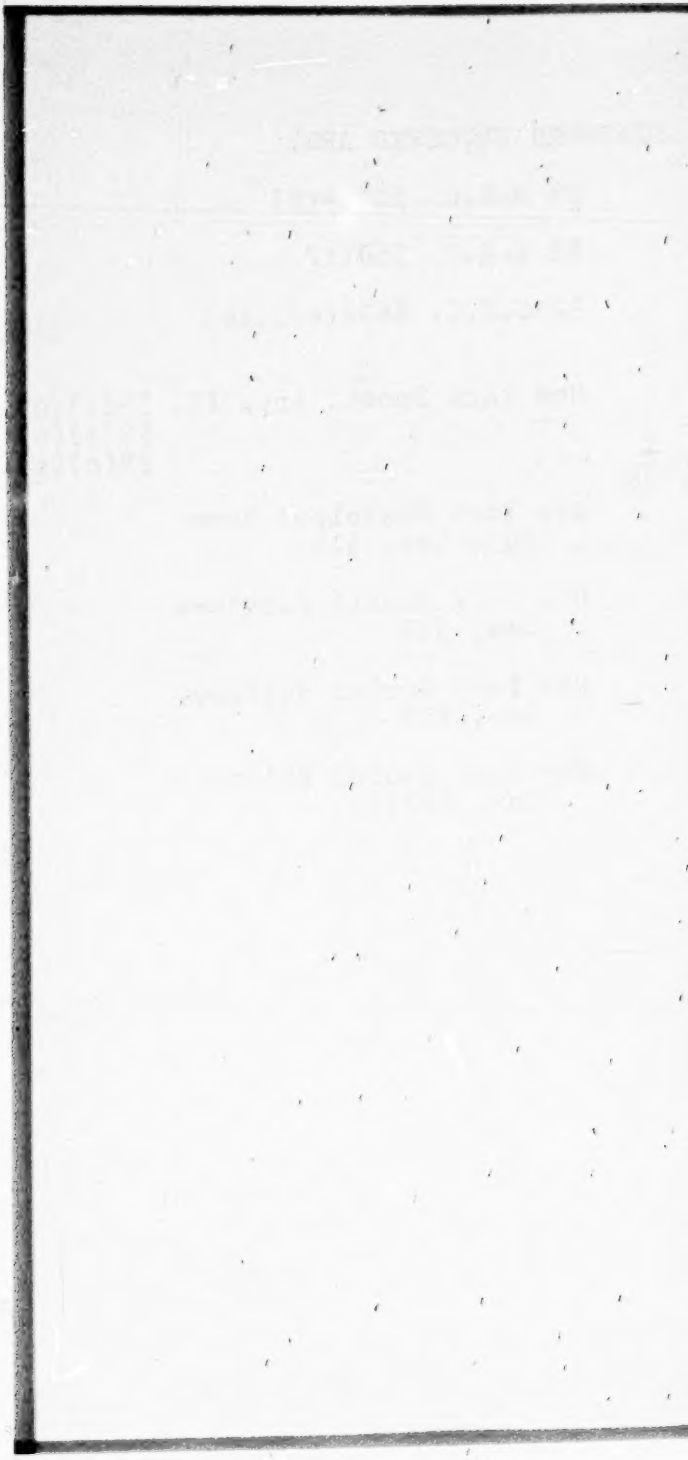
New York Social Welfare Law, §56

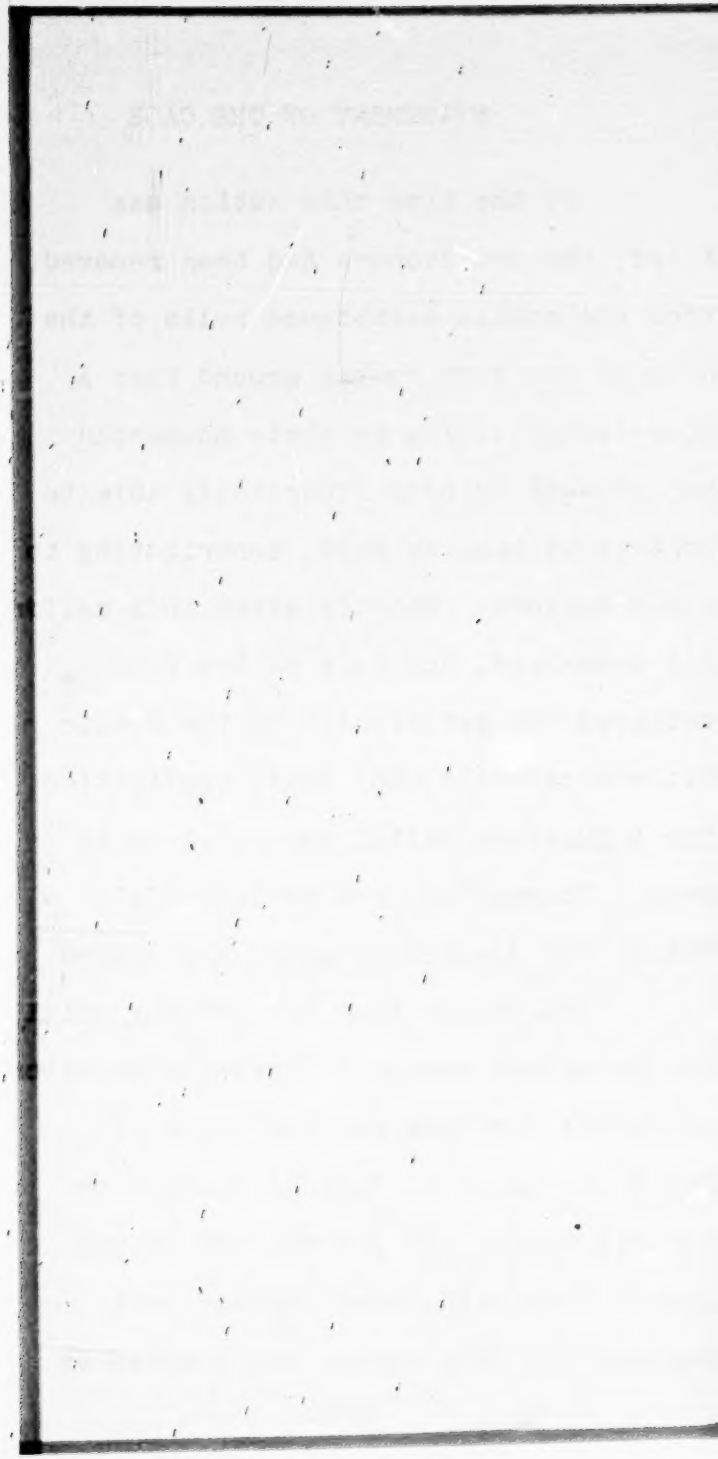
New York Social Welfare Law, §62(1)



STATEMENT OF THE CASE

At the time this action was filed, the petitioners had been removed from the public assistance rolls of the City of New York on the ground that a step-father living in their household was presumably both financially able to contribute and, in fact, contributing to their support. Shortly after this action was commenced, the City of New York restored the petitioners to the Public Assistance rolls, and their application for injunctive relief was ruled to be moot. Thereafter, the petitioners' Motion for Summary Judgment was denied.

While the case was pending trial, the defendant George K. Wyman, Commissioner of Social Services for the State of New York, moved to dismiss the action against him on the ground that he was immune from suit under the Eleventh Amendment. That motion was granted by



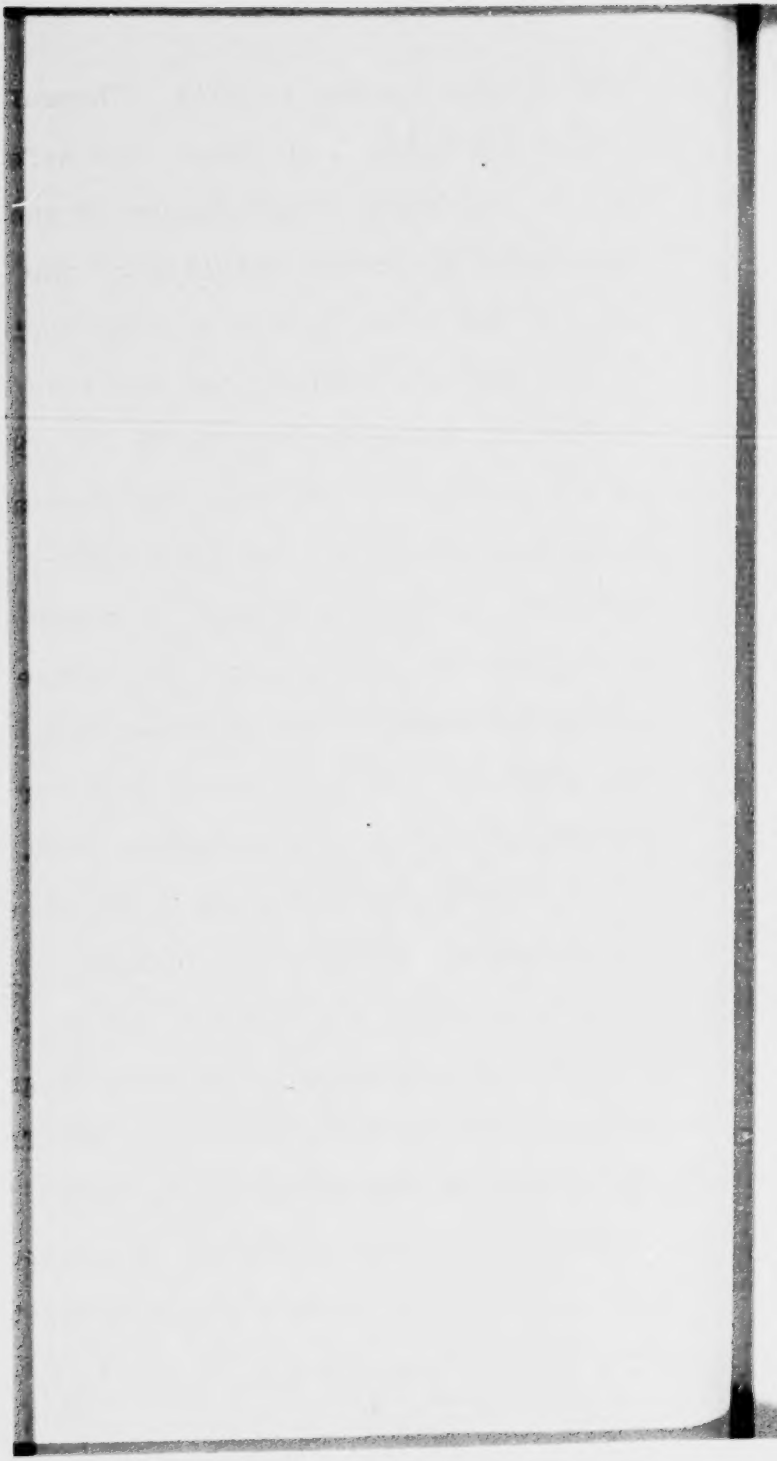
Judge Bonsal on May 7, 1973. Thereafter, during pre-trial conference, the defendant Jack R. Goldberg, Commissioner of the Department of Social Services of the City of New York, made a similar motion to dismiss, and that motion was also granted by Judge Bonsal, March 25, 1974 on the grounds of the Eleventh Amendment sovereign immunity. The petitioners appealed, and the dismissal of their action for declaratory and injunctive relief and damages was affirmed from the Bench by the Court of Appeals for the Second Circuit, December 5, 1974.

The petitioners are a mother and two children, recipients of public assistance under the federal Aid to Families with Dependent Children program (hereinafter "AFDC"), 42 U.S.C. §601ff. The father of the infant plaintiffs abandoned the family and his whereabouts are unknown. He contributes nothing to

the support of his children.

In January, 1969, petitioner Fermina Montez re-married to Luis Perdomo. The respondents then completely terminated the petitioners' AFDC payments; they presumed that merely because Luis Perdomo had married Fermina Montez, he would support not only his new wife but also his two infant step-children. In fact, Mr. Perdomo has been unable and unwilling to contribute to the support of these two children, who are not his own, and he has not done so.

Since the petitioners' assistance was restored after this action was commenced, the only issue which must still be decided is whether the petitioners are entitled to recover benefits denied during the period which their assistance was reduced or terminated by the defendants pursuant to an unlawful statute and regulations. The Court of Appeals affirmed



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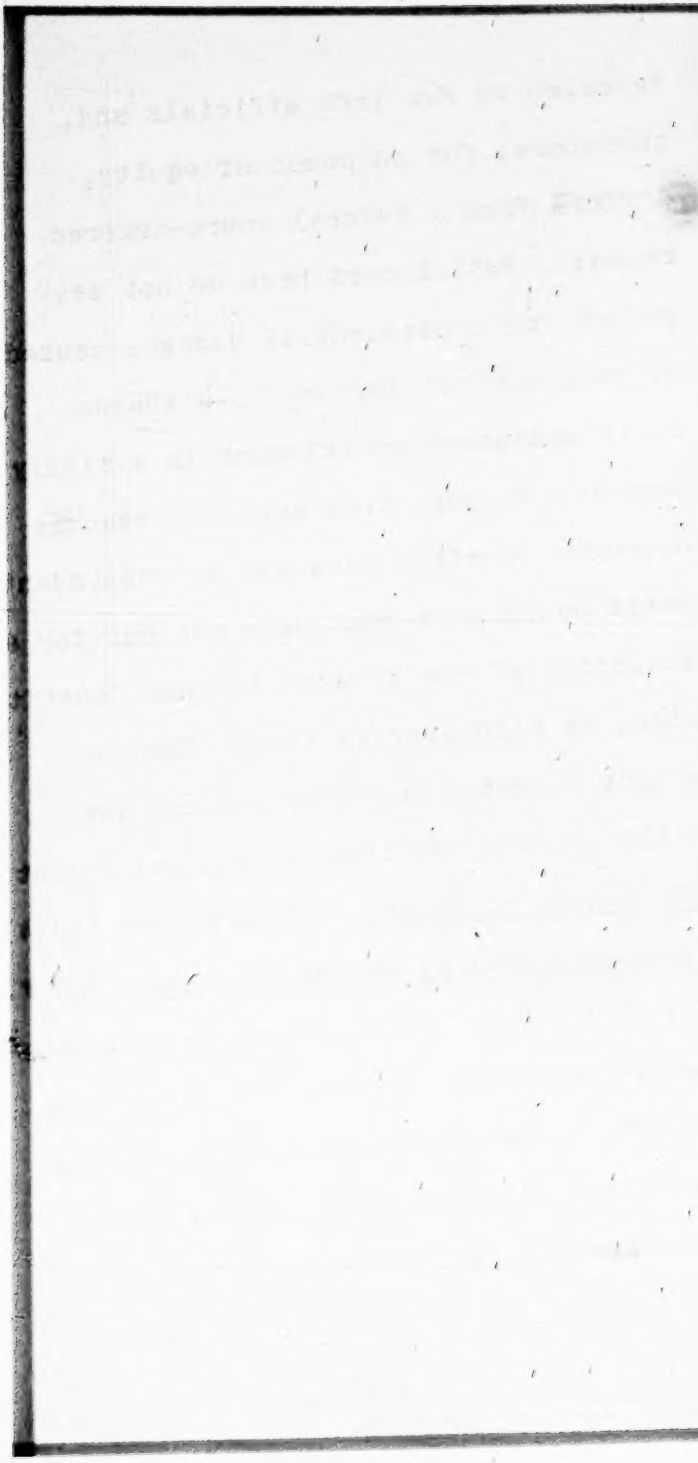
Judge Bonsal's ruling that there was no basis for the Court to exercise its equity powers to grant benefits and that the action should be dismissed.

POINT I

THE STATE SHOULD NOT BE PERMITTED TO INVOKE SOVEREIGN IMMUNITY IN A CASE INVOLVING A SMALL, SPECIFIC SUM DENIED PURSUANT TO AN UNCONSTITUTIONAL REGULATION, LATER VOLUNTARILY REPEALED, AS SUCH A CLAIM IS OUT OF THE PURVIEW OF ROTHSTEIN AND EDELMAN.

The instant application for Certiorari differs from this Court's decision in Edelman v. Jordan, 94 S. Ct. 1347 (1974) and the decision relied upon for dismissal of this suit by the Court of Appeals, Rothstein v. Wyman, 467 F.2d 226 (2nd Cir. 1972), cert. denied 411 U.S. 921 (1973), in many crucial and determinative respects. Both Edelman, supra, at 1356 and Rothstein, supra, at 236-237, were class actions involving substantial amounts of money. The present case is not, of course, a class action nor does it involve substantial or indeterminable amounts of money. The challenged regulation in the instant case was voluntarily

repealed by New York officials and, therefore, for purposes of equity, differs from a Federal court-ordered repeal. Petitioners here do not seek relief for consequential damages caused by respondents' failure to disburse their statutory entitlement in a timely manner. Rather, they ask that exactly measured benefits retained by respondents, which would have been paid out but for a violation of the federal law and Constitution, be paid over to them. The sum sought budgeted for a mother and two children -- a specific liquidated amount. Cf. Miguel v. McCarl, 291 U.S. 442 (1934); Clackamas County, Oregon v. McKay, 219 F.2d 479 (D.C. Cir. 1954). Thus, here, retroactive adjustments would not add to the already budgeted administrative expense but would disburse those monies which comprise the full measure of the



statutory entitlement (under $1,000.00).* Cf. Carter v. Butz, 479 F.2d 1084 (3rd Cir. 1973); Bermudez v. U.S. Dept. of Agriculture, 490 F.2d 718 (D.C. Cir. 1973).

Both Edelman, supra,:

> But we must judge the award actually made in this case. And not one which might have been differently tailored in a different case. at 1357.

and Rothstein, supra,:

> [T]here may perhaps may be cases in which the prompt payment of funds wrongfully withheld will serve that end. (retro-active benefits.) at 235.

suggest that the remedy sought here might exist in a different factual

---

* The State and City have offered rival figures for calculation, even suggesting no money is due as stated in the District Court's opinion, but the claim of no money due rests upon holding the step-father liable for medical care and the precise amount could be measured by a Master.

situation. In fact, Rothstein, supra, relied upon by this Court in Edelman, supra, specifically referred to the type of factual differences in this case and the problems both admininistratively and equitably incurred by the Court and welfare officials if a retroactive award had been made:

> [R]etroactive payments will go to persons no longer on the rolls. at 234. (Mrs. Montez is still on.)
>
> The funds which were misspent are, as a practical matter, irretrievable. It would be unthinkable to order welfare recipients who received federal money under an illegal state program to return their checks. at 235. (There is no question of need, on the one hand, and no danger of misspending, on the other.)

POINT II

THE POWER TO AWARD COSTS AGAINST STATE OFFICIALS PREDICATES THE AWARD OF RETROACTIVE ENTITLEMENTS AGAINST STATE OFFICIALS.

In Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), Chief Justice Taft said:

> That the sovereign is not to be taxed with costs in either civil or criminal cases by rule of court without a statute is undoubtedly true...But is the state to be regarded as a sovereign here? This court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this court loses some of its character as such.
>
> ... A rule of this court as to the awarding and division of costs is, of

> course, not a statute, but such a rule seems to us to be within the inherent authority of the court in the orderly administration of justice as between all parties litigant, properly within its jurisdiction, except the sovereign government.
>
> * * * * * *
>
> ... We think that the rule construed by long practice justifies us in treating the state just as any other litigant, and in imposing costs upon it as such...", supra, at 73-75.

Retroactive benefits, where otherwise appropriate are, like costs, a necessary part of an action to vindicate Constitutional rights. They are not comparable to an award of damages. The Court would simply be "ordering the return of that which rightfully belong[ed] to [them]." Cf. Porter v. Warner Holding Co., 327 U.S. 395, 402 (1947).

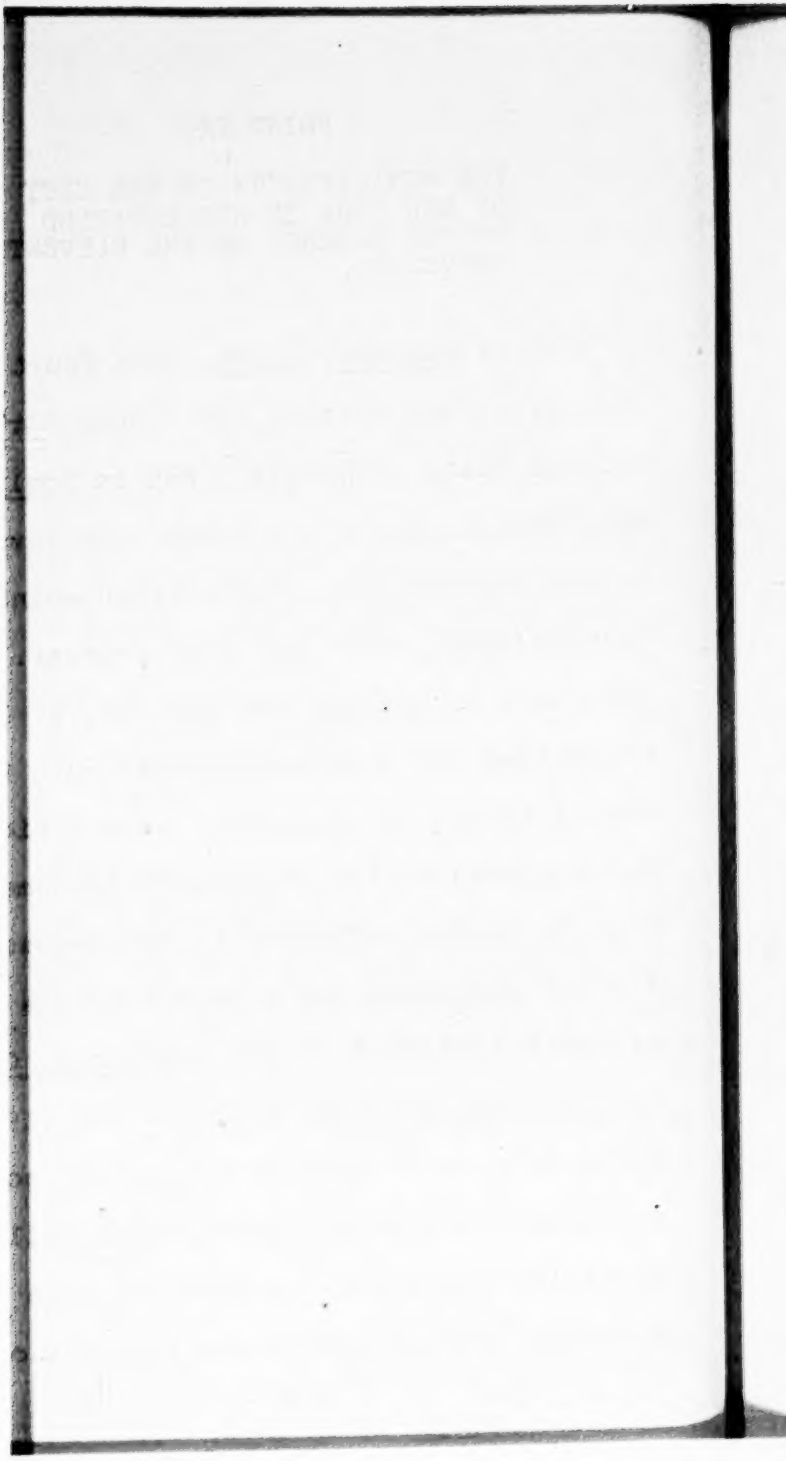
This Court's continuing commitment to vindicating federal constitutional

rights through suits against state officers was manifested in the very recent decision of a unanimous Court in authorizing suits for damages against state officials, Scheuer v. Rhodes, 416 U.S. 232 (1974).

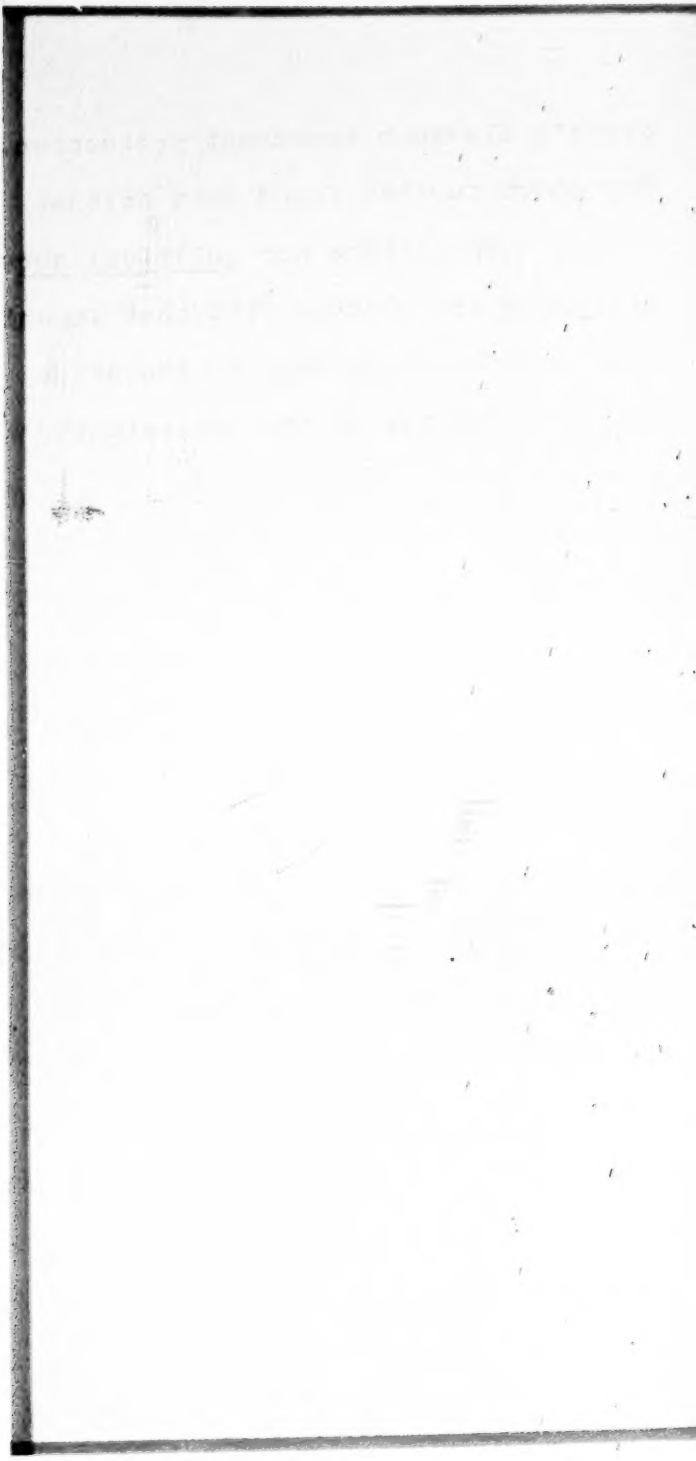
POINT III

THE MUNICIPALITY OF THE CITY OF NEW YORK IS NOT ENTITLED TO THE DEFENSE OF THE ELEVENTH AMENDMENT.

In Edelman, supra, this Court recognized and treated the County Directors as State officials. But in Edelman, only federal and state funds were involved. In the instant case, funds exist emanating from federal, state and city sources. The Court in Edelman, at note 12, p. 1358 recognized the long-established rule that county action is generally state action for purposes of the Fourteenth Amendment but, "a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment." Cf. Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1918) where this court held that a public corporation, such as an agricultural college, receiving state aid and invested with municipal powers cannot avail itself of the



state's Eleventh Amendment protection. The court further found that neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone, by virtue of its sovereignty.



POINT IV

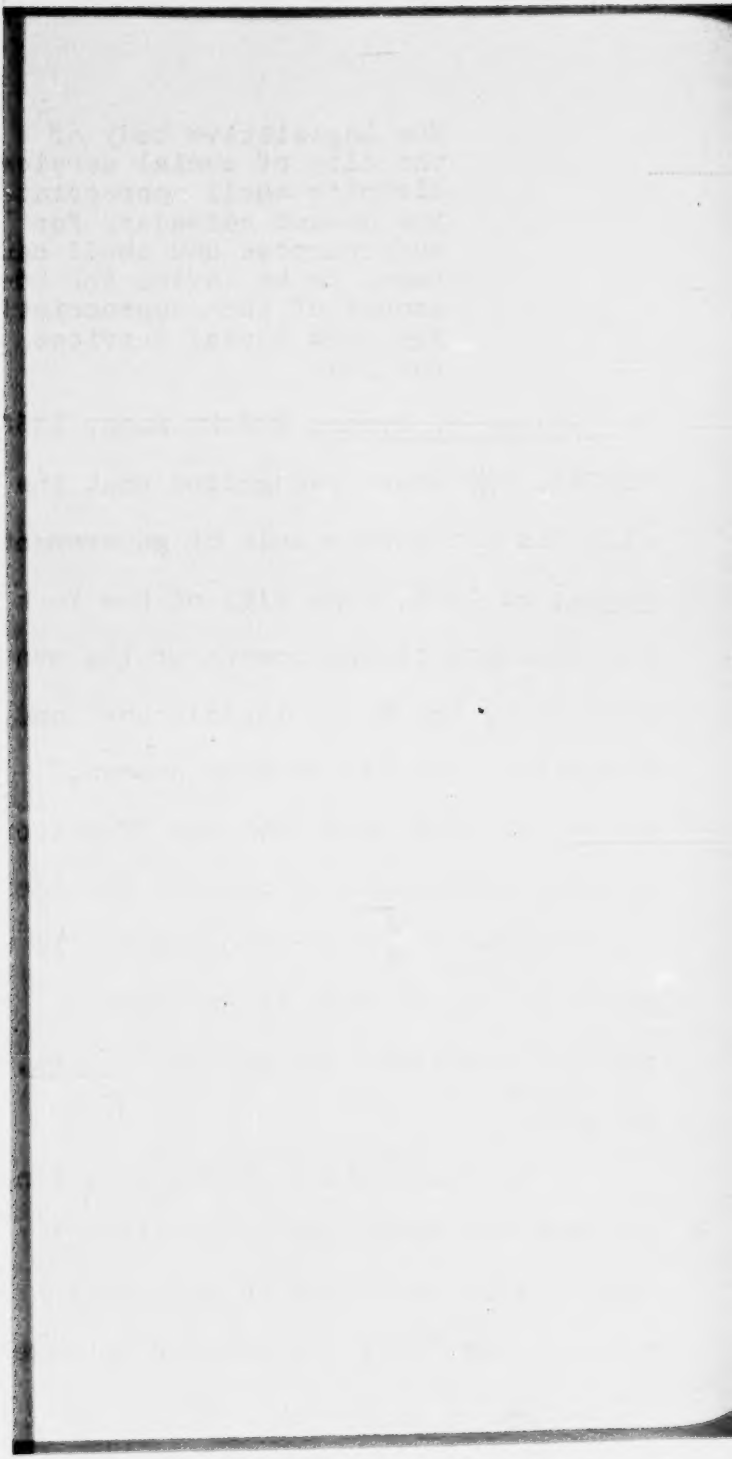
RELIEF AGAINST THE MUNICIPAL CORPORATION OF NEW YORK WOULD NOT BE BARRED BY THE ELEVENTH AMENDMENT AS A SUIT IS AGAINST THE SOVEREIGN, SINCE THE MONEY DOES NOT COME FROM THE STATE OF FEDERAL SOVEREIGN'S TREASURY.

The United States Court of Appeals, Second Circuit itself, has recently stated the differences between the Department of Social Services of the State of New York and the Department of Social Services of the City of New York. In City of New York v. Richardson, 473 F.2d 923 (2nd Cir. 1973), the court recognized that a municipal corporation, created by a State has no privilege or immunities under the federal constitution which it may invoke against the State. The city, by State statute, sets standards for eligibility, payment schedules and the conditions of administration to finance its own public assistance needs.

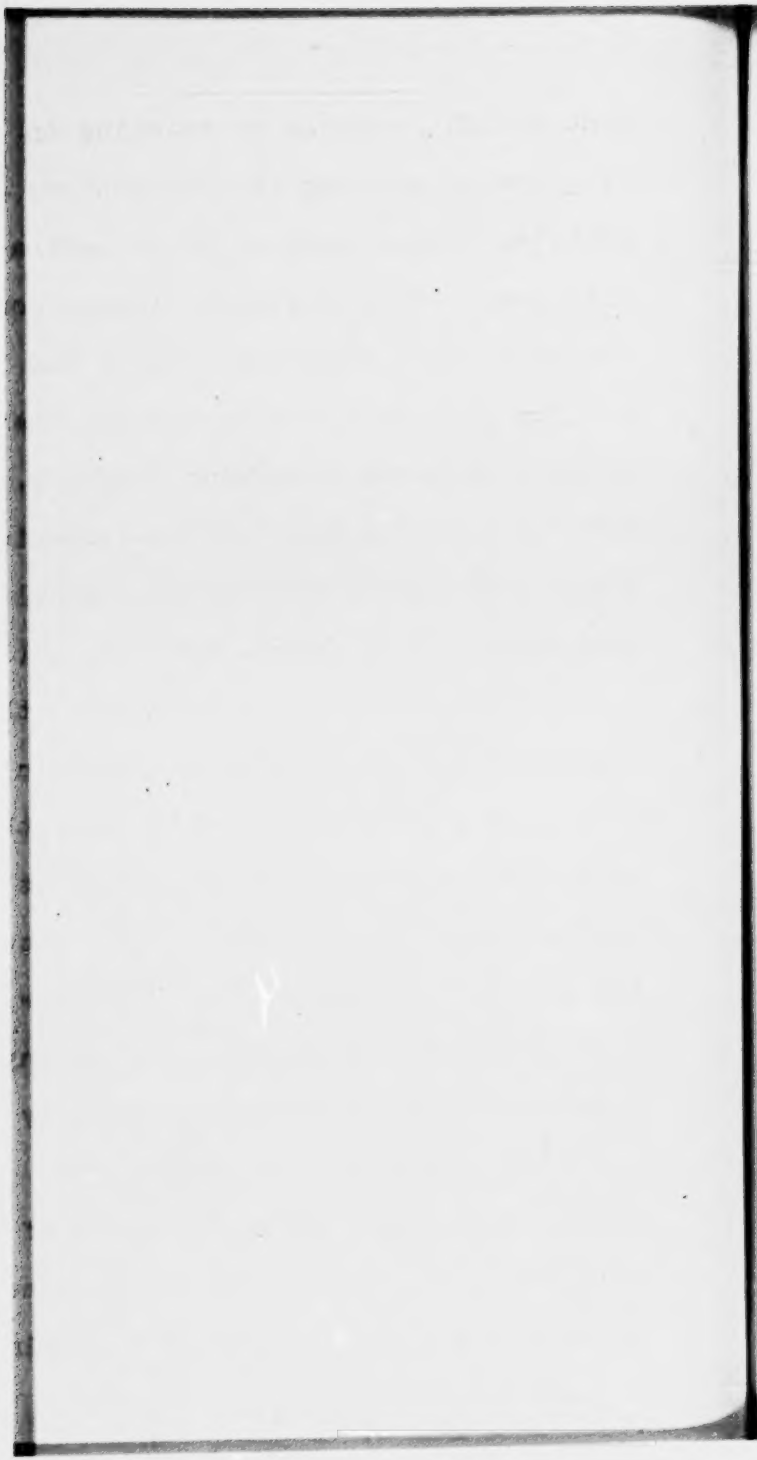
> The Legislative body of the city of social services district shall appropriate the amount necessary for such purpose and shall cause taxes to be levied for the amount of such appropriation. New York Social Services Law §91.

In Lindsay v. Wyman, 372 F. Supp. 1360 (1974), the Court recognized that the city "is a separate unit of government," supra, at 1366, "the city of New York has separate taxing powers of its own granted by the State legislature" and possesses "special revenue powers," supra, at 1368, and that the "function of city government to support the poor ...whatever the State contributes is a grant in aid of what is at least a partial municipal obligation." supra, at 1370.

An examination of the relation between the State and its political subdivision, in order to determine whether the State has created an indepen-



dent entity, capable of existing on its own, and of meeting its obligations and settling claims against it is central to this case. This analysis clearly compels the conclusion that the City of New York and its officials are not within the State's Eleventh Amendment immunity. Article 9 of the New York Constitution deals with Local Governments. Local government (N.Y. Const. Art. IX, §9(1)(c)): They have full control over their employees and their actions (§9(a)(c)(1)). They have full control over the presentation and discharge of claims against them (§9(2)(c)(5)). See also, the New York Municipal Home Rule Law, §10. This result clearly negates any claim of Eleventh Amendment immunity for the City defendant, in view of the policy enunciated above for cases of this kind, and in view of the Supreme Court's stated philosophy of confining



the immunity in general. See Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939).

The Court of Appeals for the Ninth Circuit has held that the Eleventh Amendment does not confer immunity upon municipal corporations. Long Beach v. Metcalf, 103 F.2d 483 (9th Cir. 1939).

Further, in this case there is no showing that the State will, in any way, be directly affected by this suit's effect on the City. It has been established as a matter of Federal law since before the enactment of the Fourteenth Amendment that the result of any subsequent or ancillary proceeding, the outcome of which may in the future affect the State treasury (if in this case the State volunteers to reimburse or is obligated, if they are) is irrelevant to a pending case in Federal court. Missouri, Kansas & Texas Ry. Co. v. Hickman, 183 U. S. 53,

22 S. Ct. 18 (1901). In that case, the court went on to hold that:

> Neither can it be held that the state's voluntary assumption of the costs of the litigation when the decree is adverse to the railroad commission makes it the real party plaintiff. That is simply an incidental matter... 22 S. Ct. at page 21.

Further, this quasi-agency theory goes against the state statute and state case law. The New York State Social Welfare Law §62(1) provides:

> Subject to reimbursement in the cases hereinafter provided for, each public welfare district* shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself.

Thus, the primary liability is upon the

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* New York City is a public welfare district. New York Social Welfare Law, §56.

City, subject to later State reimbursement in appropriate cases.* Prospective refusal of State reimbursement does not excuse the City's present obligation to the recipient. Lawson v. Shuart, 323 N.Y.S.2d 488 (Sup. Ct. Nas. Cty. 1971) at page 490; see Young v. Shuart, 325 N.Y.S.2d 113 (Sup. Ct. Nas. Cty. 1971) aff'd 331 N.Y.S.2d 962 (App. Div. 2d Dept. 1972); Preston v. Barbaro, 305 N.YS.2d 627 (Sup. Ct. Nas. Cty. 1969) aff'd 311 N.Y.S.2d 997 (2nd Dept. 1970).

There is no basis for extending the State's limited Eleventh Amendment immunity to the City defendant in this case.

* Whether this case is appropriate is, at the present, conjectural under State Law.

CONCLUSION

For all of the foregoing reasons, this court should grant a Writ of Certiorari.

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APPENDIX

Memorandum of District Judge Bonsal,
dated March 25, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 4773 #40500

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Defendants.

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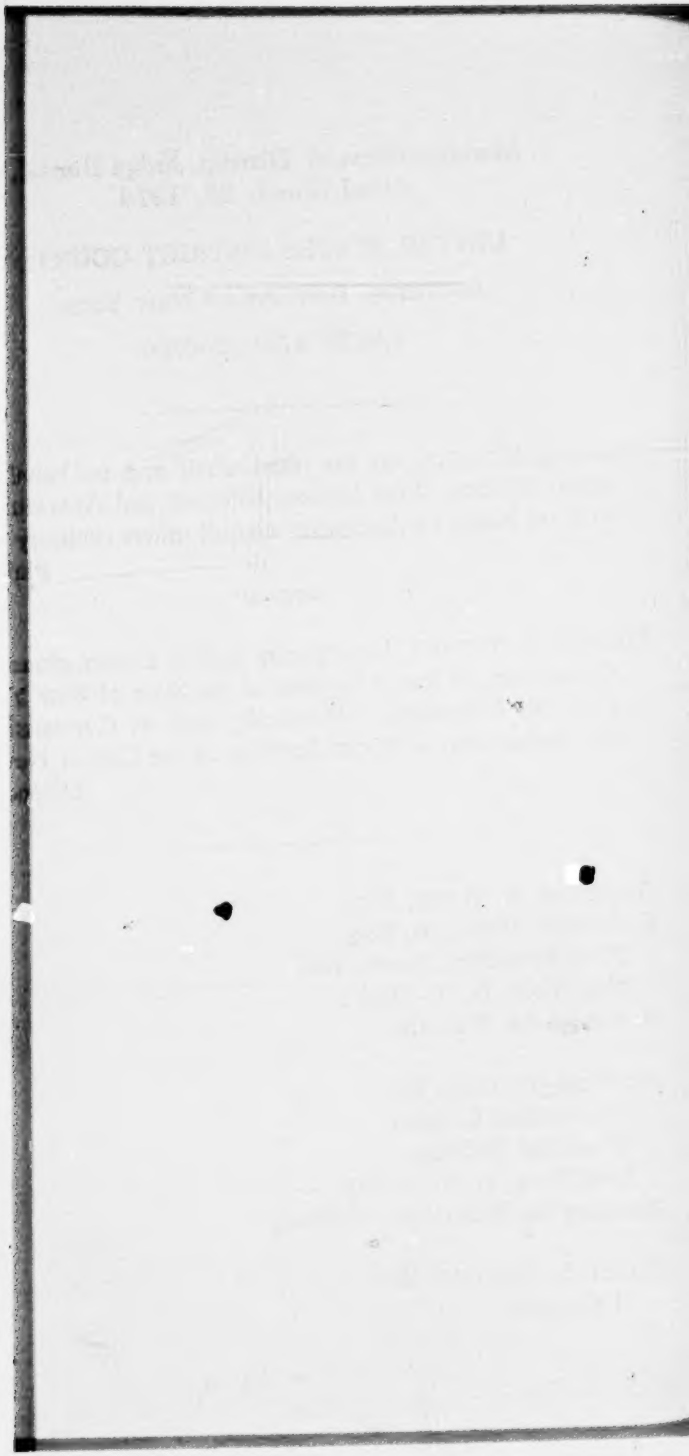

Memorandum of District Judge Bonsal, dated March 25, 1974

MEMORANDUM

BONSAL, D. J.

Plaintiff, on her own behalf, on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted this action on October 31, 1969 against defendants, George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York, seeking relief from the enforcement of § 353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N. Y. C. R. R. § 353.3(a)(2)), which requires that the income of a stepparent in excess of his own needs as defined by the State be applied against the needs of his stepchildren in their application for assistance. The plaintiff contends that this regulation arbitrarily assumes that the income of the stepparent is available for the support of his stepchildren and that the enforcement of this regulation constitutes a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the right to privacy, and the Social Security Act (42 U. S. C. §§ 601 et seq.) and the regulations promulgated thereunder (45 C. F. R. §§ 201 et seq.).

The complaint alleges that plaintiff, Fermina Montez, is the mother of Jose and Armando Montez, 12 and 11 years of age respectively; that the children's father, Jose Montez, stopped all support of the children in June of 1968; that plaintiff was forced to leave her employment in June of 1968 to look after her children, who had dropped out of school; that Fermina Montez divorced Jose Montez in October of 1968; that Jose Montez's present whereabouts is unknown, that Fermina Montez married Luis Perdomo in January of 1969; that Luis Perdomo is unable to contribute to the children's support other than the cost of shelter; that plaintiff, Fermina Montez, received public assistance under the Aid to Families with Dependent Children ("AFDC")

program on behalf of the two Montez children; that this aid continued to February of 1969, when she received a "Notice of Intent to Suspend Public Assistance"; that aid was cut off as of February 1, 1969; that at a hearing held on March 11, 1969, plaintiff was required to report her husband's income, to be figured into the calculation of her aid; that on April 2, 1969, plaintiff requested a hearing to review her treatment; and that there was no response to this request. The complaint seeks the issuance of a temporary and permanent injunction, the convening of a 3-Judge Court under 28 U. S. C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U. S. C. § 2202, and retroactive payments. Jurisdiction is alleged under 28 U. S. C. §§ 1343(3) and 1343(4).

This action has had a varied course. On December 11, 1969, Judge Frankel denied the plaintiff's application for a temporary restraining order and the convening of a 3-Judge Court. He endorsed the moving papers:

> "Plaintiff concedes there is no dispute as to her present or future entitlement, but only an open question as to *past* allowances. The basis for this motion being concededly absent, it is denied. So ordered."

On May 27, 1970, Judge Metzner denied an application by Delia Cancel to intervene as a plaintiff in the action, suggesting that she commence an entirely new action. A new action was commenced, and on August 24, 1970 Judge Cooper: denied plaintiff Cancel's application for the convening of a 3-Judge Court on the ground that no substantial consititutional issue was raised; denied defendants' motion to dismiss the complaint; and granted the plaintiff's motion for an order permitting the action to proceed as a class action under Rule 23, Fed. R. Civ. P. *Cancel* v. *Wyman*, 321 F. Supp. 528 (S. D. N. Y. 1970), *appeal dismissed*, 441 F. 2d 553 (2d Cir. 1971). That action has since been discontinued. 70 Civ. 2359 (S. D. N. Y. Stipulation and Order filed March 6, 1974) (Conner, J.).

Memorandum of District Judge Bonsal, dated March 25, 1974

In the present case, on February 25, 1971 plaintiff moved for summary judgment to recover retroactive payments allegedly due her for the period from February 1, 1969 through December 31, 1969 in the amount of $809.20. On May 5, 1971 Judge Metzner denied the motion, stating:

> "I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations [18 N. Y. C. R. R. § 353.3(a)(2)(i) and 45 C. F. R. § 203.1] are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact, it would appear that the result would be contrary to plaintiff's contention. Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

On September 20, 1972 an order was entered by this Court dismissing the action for lack of prosecution. However, on motion of plaintiff this Order was vacated on January 18, 1973. On February 14, 1973 defendant Wyman moved pursuant to Rule 12, Fed. R. Civ. P. to dismiss the complaint as to him for lack of jurisdiction, and pursuant to Rule 15, Fed. R. Civ. P. to amend his answer to include the Eleventh Amendment as a bar to retroactive payments as sought by the plaintiff. On May 7, 1973 defendant Wyman's motion to dismiss the complaint was granted. This Court said:

> "In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her AFDC payments.
>
> . . . . Under the Eleventh Amendment, this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in AFDC payments. [citing cases]."

Memorandum of District Judge Bonsal, dated March 25, 1974

Defendant Goldberg now moves to dismiss the complaint as to him on the ground that the Court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief may be granted.

Plaintiff contends on the basis of the affidavits filed with respect to her earlier motion for summary judgment that she was entitled to a total of $2,384.70 in public assistance from February 1, 1969 through December 31, 1969, of which amount she claims she received $1,575.50, leaving a balance of $809.20. Plaintiff now claims that she was entitled to a total of $3,370.82 for the year 1969, with a balance allegedly still due of $1,795.32. Defendant, however, contends on the basis of cancelled public assistance checks issued to plaintiff and to her husband, Mr. Perdomo, that they together received the sum of $2,051.45 for the year 1969. And defendant also contends that plaintiff's figures of amounts allegedly due are incorrect in that they do not take account of the fact that Mr. Perdomo was placed on plaintiff's welfare budget in April, 1969 and that his income was included into the computation of plaintiff's need during this period.

Under New York Social Welfare Law § 101 (1966), Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. If Mr. Perdomo is included in the calculations, plaintiff would have been entitled to a total of $2,025.18 in public assistance benefits for the year 1969. The affidavits, however, show that plaintiff and her husband received $2,051.45, which is of course more than this amount. In any event, the award of retroactive benefits for alleged past deficiencies in AFDC payments lies within the federal courts' equity powers. See *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972), *cert. denied*, 411 U. S. 921 (1973). On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments. Accordingly, defendant's motion to dis-

Memorandum of District Judge Bonsal, dated March 25, 1974

miss the complaint, treated as a motion for summary judgment, is granted. See Rules 12(b) and 56, Fed. R. Civ. P.

Settle order on notice.

DUDLEY B. BONSAL
U. S. D. J.

Dated: New York, N. Y.
March 25, 1974.

(4538)

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of December one thousand nine hundred and seventy-four.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. ROBERT P. ANDERSON

HON. JAMES L. OAKES

Circuit Judges,

Fermina Montez, on her own half (sic) and on behalf of her infant children, Jose Mirino Montez, and Armando Montez, on behalf of themselves and others similarly situated,

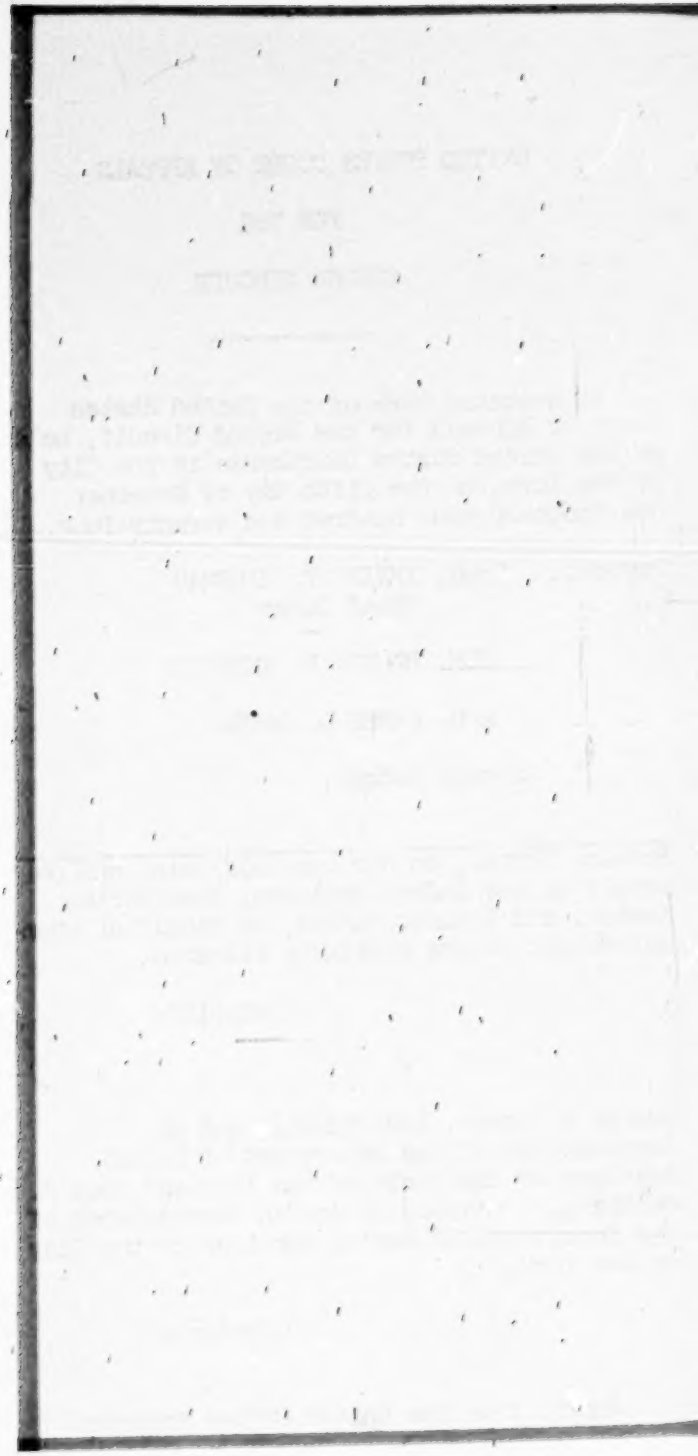
Plaintiffs

v. 74-1613

George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York,

Defendants

Appeal from the United States District



Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

by VINCENT A. CARLIN,
Chief Deputy Clerk

STATUTES and REGULATIONS INVOLVED:

Section 353.3(a)(2), Title 18 N.Y.C.R.R., Determination of Eligibility - General, provides:

> All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, shall be prorated and applied against the needs of the applicant, the spouse and the minor children of either or both. If the spouse is possessed of income but, under exceptional circumstances, refused to make application for assistance and to have his income so applied against the needs of his family, the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own need and any surplus against the needs of his dependents.

Title IV of the Social Security Act, §402(a) and (b), 42 U.S.C. §602(a) and (b):

> (a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by

reason of death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under the State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State.

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Supreme Court, U. S.
FILED
MAR 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1088

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York, and JACK R. GOLDBERG, individually and as Commissioner of The Department of Social Services of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York, and JACK R. GOLDBERG, individually and as Commissioner of The Department of Social Services of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

On December 11, 1969 the United States District Court for the Southern District of New York (FRANKEL, J.) denied petitioner's application for a temporary restraining order and the convening of a three-judge court. The endorsement on the moving papers is quoted in the Mem-

orandum of the District Court appearing in the Appendix to the Petition for Writ of Certiorari. On May 5, 1971 the District Court (METZNER, J.) denied petitioner's motion for summary judgment to recover retroactive payments allegedly due her. The Judge's statement denying the motion is quoted in the Memorandum of the District Court appearing in the Appendix to the Petition for Writ of Certiorari. On May 7, 1973 the United States District Court for the Southern District of New York (BONSAL, J.) granted the former State Commissioner's motion to dismiss the complaint as to him for lack of jurisdiction. A copy of the unreported Memorandum appears in the Appendix to this brief. On March 25, 1974 the District Court (BONSAL, J.) granted summary judgment for the former City Commissioner. A copy of the unreported memorandum appears in the Appendix to the Petition for a Writ of Certiorari. On December 5, 1974, the United States Court of Appeals for the Second Circuit affirmed the orders of the District Court. A copy of the order appears in the Appendix to the Petition for Writ of Certiorari.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1254(1).

Questions Presented

Does a plaintiff have a basis for obtaining the issuance of an injunction against enforcement of a state regulation which was not being applied against her?

Does the repeal of a regulation render moot the issue as to whether it was constitutional?

Is a money judgment against a state for the payment of retroactive benefits barred by the Eleventh Amendment?

Statement of the Case

Petitioner on her own behalf and on behalf of her infant children sought an injunction against the enforcement of Section 353.3(a)(2) of the Regulations of the New York State Department of Social Services, and retroactive payments for alleged past deficiencies arising because of the regulation. She contended that the regulation,* which has been repealed, was unconstitutional and in conflict with federal statute.

On December 11, 1969, the District Court denied petitioner's motion for a temporary restraining order and the convening of a three-judge court. The court noted:

> "Plaintiff concedes there is no dispute as to her present or future entitlement, but only on open question as to past allowances. The basis for this motion being concededly absent, it is denied. So ordered."

On May 5, 1971 the District Court denied petitioner's motion for summary judgment. The court noted that the alleged basis of petitioner's constitutional claim was insubstantial. On May 7, 1973, the court granted the former State Commissioner's motion to dismiss the complaint for lack of jurisdiction. On March 25, 1974 the court granted summary judgment for the former City Commissioner.

---

* The regulation provided:

"All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, shall be prorated and applied against the needs of the applicant, the spouse and the minor children of either or both. If the spouse is possessed of income but, under exceptional circumstances, refused to make application for assistance and to have his income so applied against the needs of his family, the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own need and any surplus against the needs of his dependents."

Reason Why Certiorari Should Be Denied

Petitioner asserts that the regulation was unconstitutional and violated federal law. She fails to set forth in the petition any basis for the assertion. See Pet. for Cert. pp. 1-2. The claim on its face is conclusory and obviously frivolous.

Furthermore at the time of the motion for a three-judge court, the regulation was not being applied against petitioner. As the District Court noted, there was no dispute as to petitioner's present or future allowances, but only an open question as to past allowances. Since the regulation was not being put into effect against her, there was no basis for granting equitable relief. See *Younger* v. *Harris,* 401 U.S. 37, 52-53 (1971); *Sosna* v. *State of Iowa,* —— U.S. ——, 42 L.Ed. 2d 532, 539.

Petitioner contends that the State should not be permitted to invoke sovereign immunity in this case. As noted above the only issue was as to past allowances. The District Court correctly ruled that it "does not have jurisdiction to direct the State of New York to make retroactive payments out of State funds for alleged past deficiencies in AFDC payments" (p. 9). As it was stated in *Edelman* v. *Jordan,* 415 U.S. 651, 678 (1974), the Eleventh Amendment defense "partakes of the nature of a jurisdictional bar" where the issue is whether retroactive payment of benefits should be ordered. See also *Rothstein* v. *Wyman,* 467 F. 2d 226, 236-237 (2d Cir. 1972), cert. denied 411 U.S. 921 (1973); *Scheuer* v. *Rhoades,* 416 U.S. 232, 237 (1974).

The issue as to whether the regulation is constitutional is moot. The suit was not a class action and the regulation was subsequently repealed. A case or controversy does not exist with respect to the validity of the regulation. See *Board of School Commissioners of the City of Indianapolis, et al.* v. *Jeff Jacobs, et al.,* —— U.S. —— 43 L.W.

4238; *Hall* v. *Beals*, 396 U.S. 45, 48 (1969); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, March 21, 1975.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

Southern District of New York

69 Civ. 4773

Fermina Montez, on her own behalf and on behalf of her infant children, Jose Mirino Montez and Armando Montez, on behalf of themselves and all others similarly situated,

Plaintiff,

against

George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York,

Defendants.

Jonathan A. Weiss, Esq.
E. Judson Jennings, Of Counsel
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Attorneys for Plaintiff

Louis J. Lefkowitz,
Attorney General of the State of New York
Attorney for Defendant Wyman
A. Seth Greenwald
Assistant Attorney General
Of Counsel

MEMORANDUM

BONSAL, D. J.

Plaintiff, on her own behalf, on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted this action on October 31, 1969 against defendants, George K. Wyman ("Wyman"), individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York, seeking relief from the enforcement of § 353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N.Y.C.R.R. § 353.3(a)(2)) which requires that the income of a stepparent, in excess of his own needs which needs are defined by the State, be applied against the needs of his stepchildren in their application for assistance. The plaintiff contends that this Regulation arbitrarily assumes that the income of the stepparent is available for the support of his stepchildren and that the enforcement of this Regulation constitutes a violation of the Due Process and Equal Protection clauses of the 14th Amendment, the right to privacy, and the Social Security Act (42 U.S.C. §§ 601, et seq.) and the Regulations promulgated thereunder (45 C.F.R. §§ 201, et seq.).

The complaint alleges that plaintiff, Fermina Montez, is the mother of the infant plaintiffs, Jose and Armando Montez, 12 and 11 years old respectively; that the children's father, Jose Montez, stopped all support of the plaintiff children in June of 1968; that plaintiff, Fermina Montez, was forced to leave her job in June of 1968 to look after her children who had dropped out of school; that Fermina Montez divorced Jose Montez in October of 1968; that Jose Montez's present whereabouts is unknown; that Fermina Montez married Luis Perdomo in January of 1969; that Luis Perdomo is unable to contribute to the children's support other than the cost of shelter; that plaintiff, Fermina

Montez, received public assistance under the Aid to Families with Dependent Children ("AFDC") program on behalf of the two Montez children; that this aid continued to February of 1969 when she received a "Notice of Intent to Suspend Public Assistance"; that aid was cut off as of February 1, 1969; that at a hearing held on March 11, 1969, plaintiff was required to report her husband's income, to be figured into the calculation of her aid; that on April 2, 1969, plaintiff requested a hearing to review her treatment and that there was no response to this request. The complaint seeks the issuance of a temporary and permanent injunction, the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U.S.C. § 2202, and retroactive payments. The jurisdiction of this court is invoked under 28 U.S.C. § 1343(3) and (4).

This litigation has had a varied course. On December 11, 1969, Judge Frankel denied the plaintiff's application for a temporary restraining order and the convening of a three-judge court on the grounds that "Plaintiff concedes there is no dispute as to her present and future entitlement, but only an open question as to past allowances." On May 27, 1970, Judge Metzner denied an application by Delia Cancel to intervene in the action. Plaintiff then moved for summary judgment to recover $809.20 allegedly due her for the period March to November, 1969. On May 5, 1971, Judge Metzner denied this motion, stating:

> "In view of Judge Frankel's decision, this action has been limited to recovery by plaintiff of allegedly past due deficiencies during a specified period. . . .
>
> • • •
>
> "I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact, it would appear that the result would be contrary to plaintiff's contention.

> Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

Defendant Wyman now moves pursuant to Rule 12(b)(1), F.R.Civ.P. to dismiss the complaint for lack of subject matter jurisdiction on the grounds that the complaint does not raise a substantial constitutional issue to invoke the jurisdiction of this court under 28 U.S.C. § 1343. *Hagans* v. *Wyman*, 471 F.2d 347 (2d Cir. 1973). Defendant Wyman further moves to amend his answer, pursuant to Rule 15(a), F.R.Civ.P., to assert the Eleventh Amendment as a bar to directing the State to make retroactive payments. *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, —— U.S. ——, 41 U.S.L.W. 3527 (Apr. 2, 1973).

In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her AFDC payments.

Plaintiff does not contend that payment in satisfaction of a judgment against defendant Wyman would come from his personal resources, but assumes that payment is to come from the funds of the State of New York. Under the Eleventh Amendment, this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in AFDC payments. *Rothstein* v. *Wyman, supra; Like* v. *Carter*, 353 F.Supp. 405 (E.D.Mo. 1973). See also *Sostre* v. *McGinnis*, 442 F.2d 178, 204-205 (2d Cir. 1971), *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

In light of the foregoing, it is unnecessary to consider defendant Wyman's other contentions.

Accordingly, defendant Wyman's motion to dismiss the complaint as to him pursuant to Rule 12(b)(1), F.R.Civ.P., is granted.

Settle order on notice.

Dated: New York, N.Y., May 7, 1973.

DUDLEY B. BONSAL,
U. S. D. J.

(42040)

Supreme Court, U. S.
FILED
APR 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1088

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Court of Appeals for the Second Circuit properly affirmed the order of the District Court for the Southern District of New York, which granted the Municipal Defendant's motion for dismissal, treated as a motion for summary judgment 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

—against—

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented

Did the District Court, in the exercise of its equity powers, abuse its discretion in holding that it would not order the municipal defendant, Goldberg, to pay to petitioner retroactive public assistance benefits allegedly wrongfully withheld?

New York Statute Involved

Social Services Law

"§101. Liability of relatives to support

1. The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a minor child. Step-parents shall in like manner be responsible for the support of minor step-children.

2. The liability imposed by this section shall be for the benefit of the public welfare district concerned or any legally incorporated non-profit institution which receives payments from any governmental agency for the care of medically indigent persons, and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction. Such proceedings and actions may be brought by such an institution in any court wherein a similar proceeding or action could be brought by a public welfare official."

Statement of the Case

Since in our view the petition does not adequately present the procedural history of this case, we are submitting a summary of this history.

(1)

Petitioner, Fermina Montez, on her own behalf, and on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted

this civil action for declaratory and injunctive relief pursuant to 42 U.S.C. Section 1983, on October 31, 1969. Named as defendants were George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York. Petitioner sought relief from the enforcement of §353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N.Y.C.R.R. 353.3(a)(2)), which regulation (since repealed) required that the income of a stepparent in excess of his own needs as defined by the State be applied against the needs of his stepchildren in their application for assistance. Petitioner in her complaint contended that this regulation arbitrarily assumed that the income of the stepparent was available for the support of his stepchildren and that the enforcement of the regulation constituted a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the right to privacy, and the Social Security Act (42 U.S.C. 601 et seq.).

The complaint alleges the following: Petitioner Fermina Montez is the mother of Jose and Armando Montez, 12 and 11 years of age, respectively. The children's father, Jose Montez, stopped all support of the children in June 1968. Petitioner was forced to leave her employment in June 1968 to look after her children, who had dropped out of school. Petitioner divorced Jose Montez in October 1968. Montez's present "whereabouts" was not known. In January of 1969 petitioner married Luis Perdomo. He was unable to contribute to the children's support other than the cost of shelter. Petitioner received public assistance under the Aid to Families with Dependent Children (AF DC) program on behalf of the two Montez children. In

February of 1969, she received a "Notice of Intent to Suspend Public Assistance". Aid was cut off as of February 1, 1969.* At a hearing held on March 11, 1969, petitioner was required to report her husband's income, to be figured into the calculation of her aid. On April 2, 1969, petitioner requested a hearing to review her treatment. Petitioner claimed that there was no response to this request.

The petitioner in her complaint requested the issuance of temporary and permanent injunctions, the convening of a 3-Judge Court under 28 U.S.C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U.S.C. § 2202, and retroactive payments. Jurisdiction was alleged under 28 U.S.C. §§ 1343 (3) and 1343(4).

On December 11, 1969, Judge FRANKEL denied the plaintiff's application for a temporary restraining order and the convening of a 3-Judge Court. He endorsed the moving papers:

> "Plaintiff concedes there is no dispute as to her present or future entitlement, but only an open question as to past allowances. The basis for this motion being concededly absent, it is denied. So ordered."

(2)

On May 27, 1970, Judge METZNER denied an application by one Delia Cancel to intervene in the action, suggesting

---

* It should be noted that petitioner's aid was terminated on February 11, 1969 because of her marriage. Assistance was resumed on February 19, 1969. A pre-termination review was held on March 11, 1969 because Mrs. Perdomo refused to allow the Department of Social Services to complete its investigation. As a result of this review aid was again terminated on March 24, 1969. Petitioner reapplied for assistance on March 25, 1969, and, since her husband had signed an application for public assistance, the aid was restored on April 1, 1969.

that she commence an entirely new action. An action was subsequently instituted challenging the aforementioned state regulation. *Cancel* v. *Wyman,* 321 F. Supp. 528 (S.D. N.Y., 1970). On August 24, 1970, Judge COOPER denied Cancel's application for the convening of a 3-Judge Court on the basis that no substantial constitutional question was raised. Judge COOPER permitted maintenance of a class action, and left for trial the issue as to the existence of a conflict between state and federal regulations. An appeal of this decision was subsequently dismissed. *Cancel* v. *Wyman,* 441 F. 2d 553 (2d Cir., 1971).

(3)

In the present case, on February 25, 1971, petitioner moved for summary judgment to recover retroactive payments allegedly due her for the period from February 1, 1969, through December 31, 1969, in the amount of $809.20. On May 5, 1971, Judge METZNER denied the motion, stating:

> "In view of Judge Frankel's decision, this action has been limited to recovery by plaintiff of allegedly past due deficiencies during a specified period. . . .
>
> I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations (18 N.Y.C.R.R. §353.3(a)(2)(i) and 45 C.F.R. §203.1) are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact it would appear that the result would be contrary to plaintiff's contention. Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

On September 20, 1972, an order was entered by the District Court for the Southern District of New York, dis-

missing the action for lack of prosecution. However, on motion of the petitioner, this order was vacated on January 18, 1973. On February 14, 1973, defendant Wyman moved pursuant to Rule 12, Fed. R. Civ. Pr., to dismiss the complaint as to him for lack of jurisdiction, and, pursuant to Rule 15, Fed. R. Civ. Pr., to amend his answer to include the Eleventh Amendment as a bar to retroactive payments as sought by plaintiff. On May 7, 1973, defendant Wyman's motion to dismiss the complaint was granted. Judge BONSAL wrote:

> "In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her A.F.D.C. payments.
>
> . . . Under the Eleventh Amendment this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in A.F.D.C. payments (citing cases)."

(4)

On December 17, 1973, defendant Goldberg moved pursuant to Rule 12(b)(1) and (6) Fed. R. Civ. Pr., for an order dismissing the complaint as to him on the grounds that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief might be granted.

Petitioner had originally contended, on the basis of the affidavits filed with respect to her earlier motion for summary judgment, in 1972, that she was entitled to a total of $2,384.70 in public assistance from February 1, 1969 through December 31, 1969, of which amount she claims to

have received $1,575.50, leaving a balance of $809.20. At the time of defendants' motion to dismiss, petitioner claimed that she was entitled to a total of $3,370.82 for the year 1969, with a balance allegedly still due of $1,795.32.

In an affidavit in support of defendant Goldberg's motion to dismiss, Gayle Redford, an Assistant Corporation Counsel, contended that petitioner's calculations are inaccurate in that they do not take into account the fact that her husband, Mr. Perdomo was placed on petitioner's welfare budget in April 1969 and that his income was included in the computation of petitioner's need for the following nine month period of 1969. Moreover, the calculations do not accurately reflect the extent to which Perdomo's income should have been applied in determining his and petitioner's welfare benefits.

The cancelled welfare checks submitted by defendant Goldberg indicate that from April 1, 1969, through December 31, 1969, virtually every check under case number 2769360 was issued to Luis Perdomo; only two, totalling $46.00, were issued to plaintiff. The checks issued to Luis Perdomo supplemented his monthly income of $278.00. This income should have been applied in calculating the benefits due Perdomo and, at the very least, plaintiff (and their son Luis), during the 9 months in which they were on the same welfare budget. These earnings totalled $2,502.00 ($278.00 $\times$ 9) from April 1, 1969 through December 31, 1969. Despite this income, petitioner claimed that her husband was giving her only about $100 a month.

The affidavit in support of defendant Goldberg's motion showed that no money was owed to the petitioner. While petitioner claimed that, from February 1, 1969 through

December 31, 1969, she received only $1,575.59 in assistance, the cancelled checks submitted by defendant Goldberg clearly indicated that petitioner and her husband were actually paid $2,051.45 during that period under case number 2769360.

In addition, payments totalling $1,203.44 were paid by the Department of Social Services under the medicaid program for hospitalization of petitioner in connection with her pregnancy and the birth of Luis Perdomo in November, 1969. This child is the son of petitioner and Luis Perdomo. Even if Perdomo's salary had not been applied in calculating welfare benefits due petitioner and her husband, then it should have been applied to the hospital bills incurred by petitioner. This was not done.

Judge BONSAL granted defendant Goldberg's motion to dismiss the complaint, treated as a motion for summary judgment. In a decision dated March 25, 1974, Judge BONSAL wrote (Appendix to Petition, pp. A5-A6):

> "... Under New York Social Welfare Law §101 (1966) Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. If Mr. Perdomo is included in the calculations, plaintiff would have been entitled to a total of $2,025.18 in public assistance benefits for the year 1969. The affidavits, however, show that plaintiff and her husband received $2,051.45, which is of course more than this amount. In any event, the award of retroactive benefits for alleged past deficiencies in AFDC payments lies within the federal courts' equity powers. See Rothstein v. Wyman, 467 F. 2d 226 (2d Cir. 1972), cert. denied, 411

U.S. 921 (1973). On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments."

The Court of Appeals for the Second Circuit affirmed, without opinion, on December 5, 1974.

ARGUMENT

The Court of Appeals for the Second Circuit properly affirmed the order of the District Court for the Southern District of New York, which granted the Municipal Defendant's motion for dismissal, treated as a motion for summary judgment.

(1)

The only issue before the District Court was whether petitioner is entitled to retroactive payments for alleged past deficiencies in her AFDC payments. Petitioner had originally contended, on the basis of the affidavits filed with respect to her earlier motion for summary judgment, that she was entitled to a total of $2,384.70 in public assistance from February 1, 1969, through December 31, 1969, of which amount she claimed that she received $1,575.50, leaving a balance due of $809.20. Subsequently, petitioner claimed that she was entitled to a total of $3,370.82 for the year 1969, with a balance allegedly due of $1,795.32.

The Municipal Defendant Goldberg made a motion to dismiss the complaint as to him on the ground that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief might be granted. Defendant Goldberg's motion was ac-

companied by an affidavit by Assistant Corporation Counsel, Gayle Redford, and photocopies of cancelled welfare checks issued to the petitioner and her husband for 1969. The affidavit and the checks conclusively proved that, while petitioner claimed in her complaint that she received only $1,575.50 in assistance from February 1, 1969 through December 31, 1969, petitioner and her husband were actually paid $2,051.45 during that period under case number 2769360. It was also affirmed that petitioner's figures for amounts allegedly due were incorrect in that they did not take into account the fact that Mr. Perdomo was placed on petitioner's welfare budget in April 1969 and that his income was included in the computation of plaintiff's need during this period.

The decision of the District Court stated that under New York Social Welfare Law §101 (1966), Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. Judge Bonsal's opinion indicated that the petitioner was very likely overpaid for the year 1969. However, the decision did not expressly rest on this ground. The Court instead concluded that: "On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments." The Court did not discuss defendant Goldberg's asserted Eleventh Amendment defense.

(2)

Under the Federal Rules of Civil Procedure a Rule 12 (b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to be converted into motion for summary judgment whenever matters outside the pleadings are presented to and accepted by the Court.

In the instant case municipal defendant Goldberg's motion to dismiss was accompanied by an affidavit and cancelled checks which, we believe, conclusively showed that the petitioner was not, in fact, owed any additional money, since she was paid $2,051.45 from February 1, 1969 through December 31, 1969 under case number 2769360.* The District Court's opinion does not purport to rest on this ground. However, the Court did appear to accept the defendant Goldberg's figures as accurate. Based upon this showing by the defendant Goldberg, and the failure of plaintiff, in the court below as well as in this petition, to present any convincing contrary figures, we submit that this was an *a fortiori* case for the trial court's declining to exercise its discretion to refuse equitable relief.

It is accepted that under *Rothstein* v. *Wyman,* 467 F. 2d 266 (2nd Cir., 1972), *cert. denied,* 411 U.S. 921 (1973), the Court's equity jurisdiction may be used to determine if retroactive benefits are recoverable in cases involving categorical aid under the Social Security Act. In *Rothstein,* a case brought by recipients of Aid to the Aged Blind and Disabled from the seven counties surrounding New York City challenging Social Services Law §131-a, the District Court enjoined the defendants from enforcement of that statute and awarded retroactive benefits. On appeal, the Court of Appeals for the Second Circuit held that the award

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* In the Second Circuit affidavits and exhibits have been accepted on Rule 12(b)(6) motions, and when so accepted the motion becomes one for summary judgment. See, *e.g., Thompson* v. *New York Central R.R. Co.,* 361 F. 2d 137 (2nd Cir., 1966) (affidavits); *Larsen* v. *American Airlines Inc.,* 313 F. 2d 599 (2nd Cir., 1962) (affidavit); *General Tire and Rubber Co.* v. *Jefferson Chem. Co.,* 46 F.R.D. 607 (S.D.N.Y., 1969) (exhibits); *Madeirense DO Brasil S/A* v. *Stulman-Emrick Lumber Co.,* 147 F. 2d 399 (2nd Cir., 1945), cert. den. 325 U.S. 861 (1945) (exhibits—letter).

of retroactive payments by the District Court was not a proper exercise of the District Court's equitable powers. The Court said that in wielding equity power the Court must weigh competing claims and determine where a preponderance of the equities lies.

In this case, petitioner has not demonstrated on what basis the Court had any discretion to exercise its equitable power. The defendant Goldberg's calculations as shown by the affidavit and cancelled checks were not successfully challenged by petitioner. Since there was apparently no money owed to the petitioner, under any construction of the equities involved in this case, the District Court properly found that there was no basis upon which to exercise its equity jurisdiction.

(3)

Petitioner contends (Pet., p. ix) that on March 25, 1974, the District Court for the Southern District of New York (BONSAL, J.) granted the municipal defendant's motion to dismiss on the grounds of the Eleventh Amendment sovereign immunity. We respectfully submit that Judge BONSAL dismissed the case because on the basis of the record, including affidavits of the Municipal Defendant indicating that petitioner is not entitled to any money from the Municipal Defendant, the Court found "no basis for the exercise of its equity powers to grant the claimed retroactive payments." The District Court and the Circuit Court, then, did not base their respective determinations on the application of the Eleventh Amendment to the City of New York. This is, then, not a proper case for the United States Supreme Court to determine whether the Eleventh Amendment immunity extends to municipalities alleged to owe retroactive benefits to welfare recipients.

CONCLUSION

The petition for writ of certiorari should be denied.

April 7, 1975.

Respectfully submitted,

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